UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

LIFEWAY FOODS, INC.,

Employer,

and **Case 13-RC-113284**
Stipulated

BAKERY, CONFECTIONARY,
TOBACCO WORKERS, AND
GRAIN MILLERS INTERNATIONAL UNION,
LOCAL UNION NO. 1,

Petitioner

LIFEWAY FOODS, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 5

I. The Parties 5

II. 2009 Petition and Region's Determination of the Appropriate Unit 5

III. The Region and Parties' Multiple Stipulations to the 2009 Decision's Unit 6

IV. The Tainted Election 9

A. Petitioner Instructs Observer Not to Allow "Any Women to Vote" and to Challenge All Drivers 9

B. Petitioner Challenges to Voters Expressly Included in the 2009 Decision, Stipulated Unit 11

C. Board Agent Misconduct at Morton Grove 13

1. Board Agent Schlabowske Escorts Eligible Voters from Polling Area around 9:30 a.m. in Presence of Other Voters in Line 13

2. Board Agents Schlabowske, Ocampo, and Treadway, along with Russian Interpreter, Continue Objectionable Conduct throughout Morning Polling Session 15

3. Board Agents Schlabowske and Ocampo Continue Objectionable Conduct during Afternoon Polling Session 18

D. Board Agent Misconduct at Niles 19

1. Board Agent's Substantive Assistance to Petitioner's "Shy" Observer 19

2. Lost Challenge Envelope and Ballot of Voter Brianne Sadowski 21

QUESTIONS PRESENTED 22

ARGUMENT 24

I. The Hearing Officer violated Lifeway's due process rights by permitting an insufficiently skilled Spanish-language translator to repeatedly mistranslate and fail to translate the proceedings, despite the Company's objections, and refused to permit the Company an opportunity to challenge inaccurate translations. 24

II. The Hearing Officer violated Lifeway's due process rights by conducting substantive proceedings off the record and refusing to put the proceedings on record, over the objections of the Company. 28

III. The Hearing Officer violated Lifeway's due process rights by, over objections, allowing Petitioner's witness to testify a second time in contradiction to her prior testimony, coaching Petitioner on evidence, and presenting arguments for Petitioner. 30

IV. The Hearing Officer violated Lifeway's due process rights by relying on the wrong legal standards, repeatedly misunderstanding and confusing key testimony from both parties, and by issuing a Report that is disorganized, contradictory, and fails to cite to any part of the record... 33

V. The Hearing Officer erred when he found that Petitioner's instructions to its observers not to allow "any women to vote," to challenge all drivers and its decision to make wholesale challenges to voters, like shipping logistics and drivers expressly included in the 2009 Decision and Stipulated Unit, did not destroy laboratory conditions and was not objectionable conduct. 36

VI. The Hearing Officer erred when he found that misconduct by Board Agents at Morton Grove, including prohibiting eligible voters from casting votes and then removing them from the polling area in view of other voters, permitting Petitioner's observers to maintain and mark the "red lists," and giving substantive assistance to Petitioner's observers during the morning and afternoon sessions at Morton Grove did not destroy laboratory conditions and was not objectionable conduct. 39

VII. The Hearing Officer erred when he found that Board Agent Galliano's substantive assistance to Petitioner's "shy" observer at Niles did not destroy laboratory conditions and was not objectionable conduct. 44

VIII. The Hearing Officer erred when he found that the Region's loss of the challenge envelope and ballot of voter Brianne Sadowski and failure to maintain custody of ballot boxes did not destroy laboratory conditions and was not objectionable conduct. 48

CONCLUSION 49

TABLE OF AUTHORITIES

Cases

A. D. Juilliard and Co.,
110 NLRB 2197 (1954) 35
A.S.V. Inc.,
360 NLRB No. 138 (2014) 38
Alterman-Big Apple Inc.,
116 NLRB 1078 (1956) 45
Athbro Precision Eng'g Corp.,
166 NLRB 966 (1967) 45
Coastal Insulation Corp.,
354 NLRB 495 (2009) 25
Control Servs., Inc.,
315 NLRB 431 (1994) 30
Days Inn Mgmt. Co. v. NLRB,
930 F.2d 211 (2nd Cir. 1991) 41, 42
Days Inn Mgmt. Co.,
299 NLRB 735 (1990) 41, 42
Fresenius USA Mfg., Inc.,
352 NLRB 679 (2008) 44
George Joseph Orchard Siding, Inc.,
325 NLRB 252 (1998) 25
Glacier Packing Co., Inc.,
210 NLRB 571 (1974) 48, 51
Goya Foods, Inc.,
358 NLRB No. 43 (May 17, 2012) 49
Hudson Aviation Servs.,
288 NLRB 870 (1988) 45
In Dean & Deluca New York, Inc.,
338 NLRB 1046 (2003) 39
In Re Pan Am. Grain Co., Inc.,
No. 24-CA-8570 (JD-59-03) (NLRB Div. of Judges), 2003 WL 21251892 (May 23, 2003). 25
In Re S. Pride Catfish,
331 NLRB 618 (2000) 50, 51
Int'l Stamping Co.,
97 NLRB 921 (1951) 42
Jakel Inc.,
293 NLRB 615 (1989) 44
Laidlaw Transit, Inc.,
327 NLRB 315 (1998) 49
Madera Enterprises,
309 NLRB 774 (1992) 44, 46
Masonic Homes of Cal.,
258 NLRB 41 (1981) 35

Med. Ctr. of Beaver County, Inc. v. NLRB,
716 F.2d 995 (3d Cir. 1983) 42
Millsboro Nursing & Rehab. Ctr., Inc.,
327 NLRB 879 (1999) 50
Monroe Mfg. Co.,
200 NLRB 62 (1972) 39, 40
Montefiore Hosp. & Med. Ctr.,
261 NLRB 569 (1982) 39
Nichols House Nursing Home,
332 NLRB 1428 (2000) 40
NLRB v. Del Rey Tortilleria, Inc.,
787 F.2d 1118 (7th Cir. 1986) 25
NLRB v. WFMT,
997 F.2d 269 (7th Cir. 1993) 42
Odwalla, Inc.,
357 NLRB No. 132 (2011) 38
Paprikas Fono,
273 NLRB 1326 (1984) 44, 52
Piggly Wiggly,
168 NLRB 792 (1967) 35
Pioneer Natural Gas Co.,
253 NLRB 17 (1980) 30
Polymers Inc.,
174 NLRB 282 (1969) 47
Roto Rooter,
288 NLRB 1025 (1988) 30
S.T.A.R., Inc.,
347 NLRB 82 (2006) 39, 41
Sabine Towing & Transp. Co.,
226 NLRB 422 (1976) 45
Solar Int'l Shipping Agency, Inc.,
327 NLRB 369 (1998) 24
Sunol Valley Golf & Recreation Co.,
305 NLRB 493 (1991) 49
The Earthgrains Co.,
351 NLRB 733 (2007) 50
U.S. ex rel. Touhy v. Regan,
340 U.S. 462 (1951) 49
Wells Fargo Alarm Servs.,
289 NLRB 562 (1988) 40
White Cloud Prods.,
214 NLRB 516 (1974) 39

Regulations

29 C.F.R. § 102.118(a)(1) 46
29 C.F.R. § 102.69 38

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Lifeway Foods, Inc.	)	
and	)	**Case 13-RC-113248**
	)	**Stipulated**
Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, Local Union No. 1	)	

LIFEWAY FOODS, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS AND OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Employer Lifeway Foods, Inc. ("Lifeway" or the "Company"), submits the following Brief in Support of its Exceptions to the Report and Recommendations on Challenged Ballots and Objections to Conduct Affecting the Results of the Election[1] by Hearing Officer Scott Preston ("Hearing Officer"), dated October 31, 2014.

STATEMENT OF THE CASE

On or around September 12, 2013, the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local Union No. 1 ("Petitioner") filed an election petition with Region 13 of the Board seeking to represent certain employees working out of the Company's Niles facility. (HOR 1 & n.1). The parties ultimately entered into a stipulated election agreement to conduct an election on Thursday, June 19, 2014, with voting sessions to be held at all three Company locations in Morton Grove, Niles, and Skokie, Illinois at various times throughout the day for the following unit:

[1] References to the Hearing Officer's Report shall be designated as (HOR ___). The Hearing Officer did not number the lines in his decision or cite to the record at all. Lifeway's Brief cites only to the Report's page numbers. An official transcript was made of the proceedings and references to the transcript shall be designated as (Tr. __) References to exhibits presented at the hearing will be cited in the following manner: Board Exhibits (Bd. Ex. ___); Joint Exhibits (Jt. Ex. __); Employer Exhibits (Er. Ex. __); and Petitioner Exhibits (Pet'r. Ex. ___).

> All full-time and regular part-time production/maintenance, production, maintenance, and shipping/receiving employees employed by the Employer at its facilities currently located at 7645 North Austin Avenue, Skokie, Illinois and 6431 West Oakton, Morton Grove, Illinois, and 6101 West Grosse [sic] Point Road, Niles, Illinois; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act. (HOR 1-2).

There were approximately 211 eligible voters. Only 202 ballots, not including one void ballot, were counted by the Board according to the official Tally of Ballots. 89 votes were cast for Petitioner and 65 votes were cast against Petitioner, with 49 votes challenged, meaning that the challenges were sufficient to affect the results of the election. (HOR 2-3 & Erratum).

On June 24, 2014, both Lifeway and Petitioner timely filed Objections to the conduct of the election due in large part to serious and substantiated evidence of Board Agent misconduct during the election.[2] (Bd. Exs. 1(a), 1(b)). On July 24, 2014, after a preliminary investigation, the Regional Director issued a Report on Challenges and Objections and Notice of Hearing, finding that the challenged ballots and Objections raised substantial and material credibility issues for a hearing. (HOR 4-5; Bd. Ex. 1(c)). Prior to the hearing, the parties entered into a stipulation on the record that resolved the eligibility of certain challenged ballots; stipulated that voter Brianne Sadowski was on the *Excelsior* list and that Petitioner did, in fact, challenge her vote at Niles; and withdrew Petitioner's Objections. (Jt. Ex. 1; *see also* HOR 5-6). On August 25-28, 2014, the Hearing Officer conducted the hearing in this matter at Region 13's offices in Chicago, after which both parties filed sharply limited post-hearing briefs, due to restrictions the Hearing Officer arbitrarily imposed on their content and length. (Tr. 918-19).

On October 31, 2014, the Hearing Officer issued his Report and Recommendations on Lifeway's Objections. The Company's Objections centered on four distinct areas: Petitioner's

[2] Neither undersigned counsel nor the Company is questioning the integrity or neutrality of the Regional Office personnel involved in the election. Nonetheless, the impact of the actions described herein requires the Board to act dutifully to set aside this election.

objectionable conduct, objectionable Board Agent conduct in the morning and afternoon polling sessions at Morton Grove, objectionable Board Agent conduct at the Niles polling session, and the Region's loss of a challenged ballot.

On Petitioner's misconduct, the Hearing Officer ruled that Petitioner's wholesale challenges to the ballots of mechanics, shipping logistics employees, and drivers, in direct contravention of the stipulated election agreement, as well as Petitioner's improper challenges to eligible employees (three voters challenged for "Unknown" or "Other" and seventeen others challenged based on the location of their desks or workspaces rather than their duties) was not objectionable conduct. (HOR 8-13).

On Lifeway's Objections involving Board Agent misconduct at Morton Grove, the Hearing Officer found that the Board Agent had allowed large groups of up to 10 voters into the polling area at once, but that this was not objectionable based on various suppositions about normal Board election procedures, rather than what the evidence presented at the hearing demonstrated actually took place at the Morton Grove polling area. (HOR 28). The Hearing Officer also found that, even if one of the Board agents had removed a group of voters from the polling area, in the presence of other voters, and prevented them from voting at the behest of Petitioner's observer, this conduct was not objectionable either because of what normally occurred in Board elections (as opposed to what *did* occur at Morton Grove) or because of what he believed hypothetical voters "most likely" would see in certain situations (as opposed to what they *did* see at Morton Grove). (HOR 16-18, 28). Although he credited the testimony of Sara Hernandez, who, in relevant part, stated that the challenge process was not explained during challenges she observed while present in the voting area, the Hearing Officer contradictorily claimed elsewhere in his decision that no voters testified about this matter, and therefore denied Lifeway's Objections on this point. (HOR 24-28).

At Morton Grove, the Hearing Officer found Petitioner had maintained "red lists" of handwritten names that its observer kept "in plain sight" of voters during polling and made markings on, as observed by multiple voters and observers. The observers then returned those "red lists" to Petitioner with notations as to who voted and who did not. However, he found that this "was not objectionable conduct." (HOR 14-15). Similarly, although the Hearing Officer found that a non-Board Agent Russian language interpreter had handled multiple ballots at Morton Grove, he found this was not objectionable because of a "momentary departure" exception to Board election procedures that does not exist under Board law. (HOR 29). He also ruled that although a Board Agent had assisted Petitioner's observer in making challenges, because the Company presented allegedly "conflicting" testimony (which, as explained below, was not conflicting but testimony the Hearing Officer simply misquoted and misunderstood), he credited Petitioner's witness and found the conduct was not objectionable. (HOR 28-29).

At Niles, Lifeway presented documentary and testamentary evidence that the Board Agent had prepared her own list of challenged voters and specific reasons that she had provided for those challenges and then presented that list to Lifeway's attorney. (Er. Ex. 12; HOR 19-20, 23-24). Although the list of 18 challenges prepared by the Board Agent at Niles were Petitioner's only challenges out of 48 to state proper reasons for those challenges, and although Lifeway's attorney and its Niles observer presented consistent accounts of the Board Agent's assistance, the Hearing Officer concluded that the Company had not met its burden of showing the Board Agent assisted the Niles observer. (HOR 19-20, 23-24).

Finally, although the parties had stipulated that Petitioner had challenged voter Brianne Sadowski and the Region conceded that her ballot challenge envelope could not be found (Er. Ex.

14;[3] *see also* Bd. Ex. 1(c)), the Hearing Officer concluded that the Region was merely speculating, that essentially anything could have happened to the ballot, and overruled Lifeway's Objection. (HOR 24).

Throughout his decision, the Hearing Officer employed numerous standards that were either wrong or non-existent under Board law, as discussed in detail below. (HOR 2, 6 & n.3, 10-13, 16, 18, 28-29). Having recommended that all of Lifeway's Objections be overruled, the Hearing Officer recommended that the Board issue a Certification of Representative. Lifeway now appeals the Hearing Officer's rulings against it, as well as the recommendations he offered.

STATEMENT OF FACTS

I. The Parties

Lifeway is a leading supplier of cultured dairy and probiotic cheese products known as kefir and organic kefir. (Tr. 597-98). Headquartered in Morton Grove, Illinois, the Company employs approximately 330 employees, all of whom are full-time employees. Lifeway distributes its products from its Morton Grove, Niles and Skokie, Illinois facilities directly and extensively in the State of Illinois, primarily in the Chicago metropolitan area. On or around September 12, 2013, Petitioner filed an election petition with Region 13 seeking to represent certain employees working out of the Company's Niles facility at 6101 West Gross Point Road.

II. 2009 Petition and Region's Determination of the Appropriate Unit

In 2009, in Case No. 13-RC-21881, a union filed a petition before Region 13 seeking to represent a unit of production and maintenance employees at the Company's Niles facility only. (*See* Er. Ex. 1; Er. Ex. 2, at 7, 151). The Company contended that the only proper unit would include production/maintenance, production, maintenance, and shipping employees at all three facilities (Morton Grove, Niles, and Skokie). At a hearing to determine the proper scope of the

[3] The Board Agent even "apologize[d] in advance if this was an error on [her] part." (Er. Ex. 14).

unit, among other topics, the parties elicited testimony about the duties of drivers (*e.g.*, Er. Ex. 2, at 23, 48-49, 90-96), maintenance mechanics (*e.g.*, Er. Ex. 2, at 48-49, 77-78, 98-100, 123-24), and shipping logistics employees who worked in the office area to prepare and compile orders (*e.g.*, Er. Ex. 2, at 96-97, 109-12). Based on this testimony and briefing by the parties, the Regional Director issued a Decision and Direction of Election (the "2009 Decision") that adopted the Company's proposed unit consisting of production/maintenance, production, maintenance, and shipping employees at all three facilities. (Er. Ex. 1, at 2; Tr. 38-39). As discussed below, the Region, Petitioner, and Company would adopt essentially this same unit in this case. Importantly, in the 2009 Decision, not only did the Regional Director identify the proper unit, but he also specifically identified and described the categories of production, production/maintenance, maintenance, shipping logistics, and driver employees within it. (Er. Ex. 1, at 3-4).[4]

III. The Region and Parties' Multiple Stipulations to the 2009 Decision's Unit

On or about September 12, 2013, Petitioner filed an election petition with Region 13 of the Board seeking to represent certain employees working out of the Company's Niles facility. The Company's attorneys advised the Board Agent assigned to the petition (and later to the Morton Grove location for the election), Catherine Schlabowske, about the previous case and Decision about the appropriate unit. (Tr. 44). On or about September 17, 2013, the Board Agent advised the Company and Petitioner that, "absent extenuating circumstances or a significantly different fact pattern," the Region would likely rely on the 2009 Decision. (Er. Ex. 3, at 2). The Board Agent then e-mailed the 2009 Decision to both the Company and Petitioner. (Tr. 45-46 (Petitioner stipulating to receiving 2009 Decision)); (Tr. 793-95, 869) (Petitioner's Recording Secretary and Business Agent Beth Zavala testifying she received copy of decision)).

[4] The union later withdrew its petition. (Tr. 43).

On or about September 23, 2013, shortly after learning about the scope of the unit from the 2009 Decision, Petitioner filed an unfair labor practice charge, Case No. 13-CA-113831, blocking the petition's processing. When Petitioner again agreed to proceed with processing, however, it initially sought to specifically exclude Maintenance Mechanics from the scope of the 2009 Decision. (Er. Ex. 6; Tr. 51-53). The Company advised the Region that it would not agree to exclude Maintenance Mechanics from the unit since the Regional Director had already determined in the 2009 Decision that they were appropriately part of it. (Er. Ex. 6; Tr. 51-53).

In response, Petitioner dropped its demand to exclude the mechanics. Instead, Petitioner proposed that the Company essentially adopt the 2009 Decision's unit. (*Compare* Er. Ex. 1 *with* Er. Ex. 6; Tr. 53).[5] Based on the plain language of the 2009 Decision, the unit specifically included the categories of production, production/maintenance, maintenance, shipping logistics, and driver employees. (Er. Ex. 1, at 3-4). In the 2009 Decision, the shipping logistics employees were the shipping employees who "speak to customers on the phone and communicate with employees at the various facilities to determine the status of orders, where the product is located, and production levels. They also work with drivers, both internal and outside drivers that pick up products from all of the locations." (Er. Ex. 1, at 3; *see also* Er. Ex. 2, at 110-11).

The parties entered into a stipulated election agreement to conduct an election on Thursday, December 19, 2013, with voting sessions to be held at all three locations, Niles, Skokie and Morton Grove, at various times throughout the day. (Er. Ex. 8; Tr. 63). On or about December 3, 2013, the Company timely filed the *Excelsior* list of eligible voters. (Tr. 63-64). On or about December 11, the Region advised the Company that Petitioner had objected to the inclusion of certain drivers and certain female works that it "believe[d] . . . [we]re office employees." (Er. Ex.

[5] The only difference between the two unit descriptions was that the stipulated unit stated that all full and regular part-time employees would be included (*e.g.*, Er. Ex. 8), whereas the 2009 Decision discussed their inclusion in the Voting Eligibility narrative instead (Er. Ex. 1, at 8).

9; Tr. 63-64). Petitioner made this objection even though both drivers and shipping logistics employees—the so-called "office employees"—were both discussed in detail at the 2009 hearing and in the 2009 Decision as being part of the unit. (*See* Er. Exs. 1, 2). Within a day of the Company's attorney again reaffirming the makeup of the 2009 Decision's unit (Er. Ex. 9; Tr. 63-64), Petitioner again filed an unfair labor practice charge, Case No. 13-CA-11910, again blocking the election from moving forward.

On or about May 13, 2014, the Region approved a settlement of the pending unfair labor practice charges and the parties entered into a stipulated election agreement to conduct an election on Thursday, June 19, 2013, with voting sessions to be held at all three locations, Niles, Skokie and Morton Grove, at various times throughout the day. (Er. Ex. 10; Tr. 67-69). Once again, Petitioner and the Company stipulated to the scope of the unit, agreeing to a unit materially identical to the 2009 Decision unit. (*Compare* Er. Ex. 1 *with* Er. Ex. 10).

Days before the election, on or about June 16, 2014, the Region advised the Company that Petitioner was once again objecting to the inclusion of drivers and "office employees" on the *Excelsior* voter eligibility list. (Er. Ex. 11; Tr. 69-70). Other than three inadvertent errors that the Company agreed to remove, the Company rejected Petitioner's contention that these workers—all of whose jobs were discussed in the 2009 Decision—were not eligible voters. (*See* Er. Ex. 11 (rejecting 34 of 38 names)). The Company again advised the Region that it was unclear why Petitioner was objecting to the inclusion of drivers on the voter eligibility list when drivers had been specifically discussed and included in the 2009 Decision as part of the unit, discussed in great detail in the 2009 hearing (*e.g.*, Er. Ex. 2, at 23, 48-49, 90-96), and part of stipulated unit in this case since September 2013. (*See* Er. Exs. 1, 11; Tr. 69-71). Moreover, the Company advised the

Region that it would not have stipulated to a unit that did not include drivers when the 2009 Decision had included them. (Er. Ex. 11).

By the date of the June 19, 2014 election, Petitioner had either stipulated to or proposed a unit (or both) that was materially identical to the 2009 Decision three separate times in November 2013, December 2013, and May 2014. This unit unambiguously included production, production/maintenance, maintenance, shipping logistics, and driver employees. (Er. Ex. 1, at 3-4). Despite the 2009 Decision and despite repeatedly agreeing over nine months to a unit that included them, at the election, Petitioner challenged the ballots of maintenance mechanics, drivers, and shipping logistics employees anyway. These actions could only have been intended to chill these employees from exercising their Section 7 rights to vote.

IV. The Tainted Election

On Thursday, June 19, 2013, the Region conducted an election at each of the Company locations, with separate morning and afternoon voting sessions at Morton Grove, and single midday sessions at Niles and Skokie. (Er. Ex. 10; Tr. 67-69). As discussed in detail below, objectionable conduct by Board Agents at Morton Grove and Niles, as well as by Petitioner destroyed laboratory conditions under any reading of Board precedent.

A. Petitioner Instructs Observer Not to Allow "Any Women to Vote" and to Challenge All Drivers

On June 10, 2014, Petitioner's Recording Secretary and Business Agent Beth Zavala communicated with Lifeway employees in person, via text message, and on the telephone regarding Petitioner's plans to challenge voters. (Tr. 615-17; Er. Ex. 19). Ms. Zavala sent a list of names for which she wanted more information. (Tr. 618; Er. Ex. 19). The employee she contacted told her in a reply that some of the people on her list handled deliveries (drivers), a job that clearly fell within the stipulated unit. (Tr. 620-21; Er. Ex. 19; *see also* Er. Ex. 10). Ms. Zavala asked two

different employees to note who the drivers were on the list. (Tr. 622, 630-31; Er. Ex. 19-20). One of the employees responded that "the Russian names are drivers." (Tr. 631; Er. Ex. 20).

Ms. Zavala met in person with Petitioner's observers on June 17 to tell them "about who they should challenge." (Tr. 824). She told the observers that Petitioner was "challenging the drivers." (Tr. 824). She "specifically told them" that Petitioner would be "challenging the women," not because of their clerical duties, but because Zavala saw that those women "went into the office" and wore "regular clothes." (Tr. 824). Even after that meeting, Petitioner's observers questioned whether challenges on this basis were appropriate. For instance, on June 18, 2014, the day before the election, an observer asked Ms. Zavala via text whether it was true that he was supposed to be "not allowing any women to vote." (Tr. 634; Er. Ex. 21). Ms. Zavala responded via text that "Yes, that is right, because none of those women are working with you." (Tr. 634; Er. Ex. 21). Approximately 30 minutes later, the employee questioned Ms. Zavala about this, saying, "It's just that I wanted you [to] assure me that I am – that I won't let vote to any women (sic), right." (Tr. 644; Er. Ex. 21). Ms. Zavala responded, "Right." (Tr. 645). The observer responded that he had received her answer. (Tr. 646).

The next morning, at 5:56 a.m., Ms. Zavala sent another message to this observer saying that all of the women "are managers from the office and none of them work with you." (Tr. 647). Again, the observer questioned Ms. Zavala's instructions, saying, "I don't know if all of them are managers. What I know is that none of the woman (sic) work with us." (Tr. 646). Ms. Zavala did not respond further to the observer's question about her repeated directives to challenge all of the women, and never rescinded this directive or the directive to challenge all of the drivers. (*See* Tr. 647, 824). Instead, she reiterated that she did tell the observer "that he should challenge women." (Tr. 833). Ms. Zavala's only defense of her objectionable directives was to claim that the unit

description and 2009 Decision's reference to "office clerical employees" somehow meant employees who physically worked in the office, as opposed the packing area. (*See* Tr. 809-10; *accord* Tr. 821 (Zavala planned to challenged Hernandez because she was "female" and "was in the office area")). Ms. Zavala never reconsidered her decision to challenge drivers until after the election (Tr. 834), after the chilling effect of her blanket challenges had already occurred.

B. Petitioner Challenges to Voters Expressly Included in the 2009 Decision, Stipulated Unit

On the day of the election, Ms. Zavala had misplaced the *Excelsior* list that she had marked up with employees whom Petitioner planned to challenge. (Tr. 666). Ms. Zavala created the "red lists" used by Petitioner's observers when she found some red paper in her car and handwrote her own lists of challenges based on some other lists that she had with her. (Tr. 666-67, 687-88; Er. Exs. 12-13, 17-18, 22-24). The red lists she provided to the observers contained names of the shipping logistics employees and the drivers. (*See* Er. Exs. 8, 17-18; Tr. 740, 747 (Petitioner's observer testifying that Zavala gave him Er. Exs. 17-18); *see also* Tr. 874 (Zavala testifying to same)). These red lists of voters were returned to Petitioner after the election. (*See* Tr. 666-67 (Zavala testifying that the red lists produced by Petitioner and entered as Er. Exs. 17-18 were the red lists she prepared).)

Just as Ms. Zavala had planned, Petitioner challenged the ballots of the shipping logistics employees—save for Ms. Hernandez whom Petitioner accidentally left off the challenge list by accident (Tr. 683; *compare* Pet'r Ex. 8 *with* Er. Exs. 17-18) and Ms. Rubina whom Petitioner's observer forgot to challenge (Tr. 557, 599)—and drivers, among others, in direct contravention of the stipulated election agreement. Put another way, Petitioner intended to chill these employees from exercising their Section 7 rights to vote by challenging their ballots.

For instance, Edith Barraza is employed as a shipping logistics employee, one of the positions identified in the 2009 Decision. (Tr. 324-30 (Barraza testimony); 168, 170 (de la Fuente confirming same). Among her shipping and receiving duties, she receives orders from the clients the Company assigns to her, identifies available product in inventory and any shortages, prepares pick tickets and pallet sheets for the order, and provides a copy of the order and the paperwork to the warehouse manager. (Tr. 325-28). After other employees prepare the order for shipment according to the order, pick ticket, and pallet sheets that Ms. Barraza prepares, she orders trucks from external carriers, providing the carrier with an estimate of pallets and weight and the shipment destination. (Tr. 329-30). The duties these employees testified to match the duties identified in the 2009 Decision for shipping logistics employees. (Er. Ex. 1; *accord* Er. Ex. 2, at 110-11 (testimony regarding same)).

Ms. Barraza performs the same kind of work as other shipping logistics employees J.P. Dadivas (Tr. 331), Irina Dmitiyeva, Marlene Sjoberg, Sara Hernandez, Maria D'Souza (Tr. 331; Tr. 405-17 (Hernandez testifying to same duties, that she performs same duties as Barraza)), and Alla Rubina (Tr. 568-69 (Ackerman testifying to same)); Tr. 168, 170-73, 177, 272 (de la Fuente testifying to same)). All of these shipping logistics employees—save for Ms. Hernandez whom Petitioner accidentally left off the challenge list by accident (Tr. 683; *compare* Pet'r Ex. 8 *with* Er. Exs. 17-18) and Ms. Rubina whom Petitioner's observer forgot to challenge (Tr. 557, 599)—were challenged by Petitioner. In all, Petitioner challenged seventeen employees based on the location (or perceived location) of their desks or workspaces (in an "office" area) rather than their duties, just as Ms. Zavala had directed them to do. (Er. Ex. 13; *accord* Tr. 738 (Petitioner's observer testifying that he challenged people based on their location: "because they work at the office")).

Joseph Ackerman, an eligible voter and Company observer, testified at length about his shipping and receiving duties putting together orders for samples and special events, and the other employee, Geronimo Herrera, who shared those duties with him. (Tr. 534-51; *accord* Tr. 175-77 (de la Fuente testifying that Ackerman, Herrera were shipping and receiving employees)). Other than the volume of work, Mr. Ackerman's duties had not changed since 2009. (Tr. 549-50). Mr. Ackerman and those identical duties were specifically identified in the 2009 testimony, and his position was specifically referenced in the 2009 Decision. (Er. Ex. 2, at 106-09; Er. Ex. 1, at 3 (referring to "shipping employees [who were] responsible for putting together orders for customers who have requested that samples be sent to them"). Despite this, Petitioner challenged both Mr. Ackerman and Mr. Herrera anyway.

In addition, Petitioner improperly challenged eligible employees without offering any valid reason as required. Three voters were challenged for "Unknown" or "Other." (Er. Ex. 8). Petitioner could only have intended such facially invalid challenges to chill these employees from exercising their Section 7 rights to vote by challenging their ballots. Many of these employees do not speak English and had difficulty understanding why their ballots were being challenged or what the challenge meant.

C. Board Agent Misconduct at Morton Grove

1. Board Agent Schlabowske Escorts Eligible Voters from Polling Area around 9:30 a.m. in Presence of Other Voters in Line

At the Company's Morton Grove location, the Region held two polling periods, from 9:30 a.m. until 11:00 a.m. and from 2:00 p.m. until 3:30 p.m. (Er. Ex. 10). Unlike the Niles location, where a single Board Agent conducted the polling session (Tr. 75), three representatives of the Board were present during the polling sessions, along with a non-Board employee hired by the

Board as a translator. (Jt. Ex. 4; Tr. 612-13).[6] Board Agent Catherine Schlabowske, a field examiner; Zulma Ocampo, a language specialist; and non-Board employee Natalia Ekimovsky, a Russian language translator who worked for an outside agency, were all present for both polling sessions. (Jt. Ex. 4; Tr. 612-13). Christopher Treadway, a Board Agent working as part of the Board's Pathway program, was present during the morning session. (Jt. Ex. 4; Tr. 612-13, 729 (Petitioner's observer direct)). Among others, Board Agent Schlabowske; one of the Company's attorneys, Douglas Hass; the Company's Director of Human Resources, George de la Fuente; the Company's morning observer, Miguel Ortiz; Ms. Zavala; and Petitioner's observer, Mr. Jesus Adan, all attended the pre-election briefing prior to the morning polling session at approximately 9:00 a.m. (Tr. 154-55, 280, 492-94, 496-97, 725-26, 846-47).

At the pre-election briefing, there was a white *Excelsior* list and the red list that Ms. Zavala had created. (Tr. 495 (Ortiz direct), 509-10 (cross), 726 (Adan direct), 846-47 (Zavala second examination)). Board Agent Schlabowske informed Mr. Ortiz that Petitioner's red list was a "list of people who were not eligible to vote," not that these employees would be challenged (Tr. 495 (confirming twice)). Petitioner's observer kept the red list on the table throughout the polling session, and marked on it as voters arrived. (Tr. 497-99 (Ortiz), 738 (Adan)). The morning polling session began at approximately 9:30 a.m. (*See* Tr. 852-53, Er. Ex. 8). Shortly after the polling session began, the first voters (all female) entered the polling area as a group, at which point Petitioner's observer said that "the majority of that group were (sic) in the red list." (Tr. 500-01, 510 (Ortiz direct), 512 (cross), 521 (Hearing Officer examination)). Board Agent Schlabowske escorted the group of eight or nine out of the room "[b]ecause they were not eligible to vote." (Tr.

[6] The witnesses testifying during the hearing consistently described the identities of the individual present in the polling area during the morning and afternoon sessions. Late on the third day of the hearing, with the assistance of the Region's representative at the hearing, Mr. Koch, the parties entered into a stipulation that correlated these descriptions with the actual names of the individuals. Based on this stipulation, the Company has replaced the witnesses' descriptions of people with their actual names for ease of identification in this Brief.

500 (Ortiz direct), 512-13 (cross), 519, 522-23 (Hearing Officer examination)). At that time, other voters were waiting in line outside the polling area to vote. (Tr. 510).

Mr. de la Fuente testified that shortly after the polling session began, a group of "about five" employees came to the conference room where Mr. de la Fuente was waiting during the morning polling session (Tr. 154-55). Mr. de la Fuente recalled seeing Aneta Leja, Inna Linton, Natalya Nazimok, and Marina Kraft in the group, among others. (Tr. 157-58). When Ms. Leja and Ms. Linton reported that the group had been told that they could not vote, Mr. de la Fuente advised them that they are eligible to vote and that they should return to the polling place. (Tr. 163). Mr. de la Fuente's impression was that the group of about five voters was "fearful to return [to the polling place] because they felt it was completely unfair." (Tr. 164; *accord* Tr. 512-13 (Ortiz testifying to same)). They appeared "intimidated or frightened . . . very nervous . . . very agitated." (Tr. 280-81 (de la Fuente testifying on cross-examination)). Mr. Ortiz testified that when voters Board Agent Schlabowske had ejected from the voting area returned, Board Agent Schlabowske appeared to be nervous. (Tr. 502). Ms. Leja, Ms. Linton, and Ms. Nazimok returned to vote later in the morning with a group of both male and female employees. (Tr. 334 (Barraza direct), 419 (Hernandez direct)).

2. Board Agents Schlabowske, Ocampo, and Treadway, along with Russian Interpreter, Continue Objectionable Conduct throughout Morning Polling Session

At approximately 10:30 or 11:00 a.m., Ms. Barraza and Ms. Hernandez went to the polling area to vote. (Tr. 332-33; *accord* Tr. 418 (Hernandez testifying she voted at approximately 11:00 a.m. with Barraza), 166-68 (de la Fuente testifying that Hernandez told him the same thing)). Unlike just after the polls opened around 9:30 a.m. (*see* Tr. 510), no employees were waiting outside the polling area in line to vote when Ms. Barraza and Ms. Hernandez went to vote around

11:00 a.m. (Tr. 382). At least one other male employee, Zyril Deborja, came with them. (Tr. 334). Ms. Leja, Ms. Linton, and Ms. Nazimok (who had earlier been turned away by Board Agent Schlabowske) had returned to vote as well. (Tr. 419 (Hernandez direct)). Ms. Barraza was directly in line in front of Ms. Hernandez. (Tr. 333-34 (Barraza), 430-31, 455 (Hernandez)). When the three arrived in the polling area, four or five employees were already in line to vote. (Tr. 334 (Barraza), 420-21 (Hernandez)). All of the voters were permitted to enter the polling area as a group. (Tr. 334 (Barraza), 420 (Hernandez), 501 (Ortiz)). The Company's observer, Mr. Ortiz, was present along with Petitioner's observer, Mr. Adan, and both were seated at a table. (Tr. 336 (Barraza direct), 382-83 (Barraza cross), 422-23 (Hernandez direct)). In addition, Mr. Treadway was present and seated at one end of the table, though neither Ms. Barraza nor Ms. Hernandez knew whom he represented. (Tr. 336 (Barraza direct), 383-84 (Barraza cross); 425 (Hernandez direct)); *see also* Jt. Ex. 4 (identifying Treadway as the only other male present)). Ms. Barraza observed Board Agent Schlabowske and Board Agent Ocampo standing in the room as well, but did not know whom either of them represented. (Tr. 337-38; *accord* Tr. 424 (Hernandez testifying that Board Agent Ocampo was standing behind the observers)). Mr. Ortiz actually believed that Board Agent Schlabowske represented Petitioner. (Tr. 493-94).

None of the Board Agents ever identified themselves as being Board employees while Ms. Barraza was present or going through the voting and challenge process. (Tr. 354-56 (Barraza), 451-52, 463 (Hernandez)). The Russian interpreter, Ms. Ekimovsky, was also present in the room, and she distributed unused ballots to both Ms. Barraza and Ms. Hernandez. (Tr. 425-26, 466; Jt. Ex. 4 (identifying woman with long brown hair as Ms. Ekimovsky)). Ms. Hernandez did not recall Ms. Ekimovsky wearing any identification or otherwise identifying herself at any point when Ms.

Hernandez was present in the polling area. (Tr. 428). Petitioner's observer, Mr. Adan, did not remember any of the Board Agents wearing identification, either. (Tr. 725, 752-53).

While in line, Ms. Barraza observed two lists in front of the observers at the table. (Tr. 340). Ms. Hernandez also saw these same lists on the table. (Tr. 429-30; *accord* Tr. 497 (Ortiz testifying to same)). As each voter approached, Mr. Ortiz was checking off names on a white list while Petitioner's observer was checking names off on a "red list" that was on the table (Tr. 340, 342, 402 (Barraza); Tr. 431-32, 438 (Hernandez); Er. Ex. 17 (Morton Grove "red list")). When Ms. Barraza reached the front of the line, Board Agent Ocampo told Petitioner's observer, Mr. Adan, to challenge Ms. Barraza's vote. (Tr. 343 (Barraza direct), 385 (cross)). Ms. Hernandez, who was next in line, saw Board Agent Ocampo "glance[] over" both the red and white lists and then announce "challenge." (Tr. 450-51). Petitioner's observer made a mark on the red list next to Ms. Barraza's name. (Tr. 344 (Barraza), 431-32, 440 (Hernandez); *see also* Ex. 17; *accord* Tr. 740 (Petitioner's observer Mr. Adan confirming he made these marks on the red list)). After Ms. Barraza voted, she did not handle her own ballot in accordance with Board election procedures. Instead, Board Agent Treadway took Ms. Hernandez's ballot from her, put the ballot in an envelope, and sealed the envelope. (Tr. 346-47 (Barraza), 435-36 (Hernandez)). However, when Ms. Hernandez, who was next in line, went to vote, Petitioner's observer could not find her name on the red list that he had on the table in front of him. (Tr. 438-39).

Just after Ms. Barraza and Ms. Hernandez voted, they returned to their work areas at "the front end of the shipping and receiving" department. (Tr. 349). In addition to Ms. Hernandez, her shipping logistics colleagues J.P. Dadivas, Irina Dmitiyeva, Marlene Sjoberg, and Maria D'Souza were present and they discussed as a group whether each of their votes had been challenged. (Tr. 349-50 (Barraza); Tr. 445 (Hernandez)). No Board Agent explained the challenge process while

Ms. Hernandez was present in the polling area, and she testified that she and her coworkers just "assumed what it meant." (Tr. 451). Ms. Barraza learned that all of her shipping logistics colleagues had been challenged, except for Ms. Hernandez. (Tr. 350). Ms. Barraza was "confused" and wondered "why or what did [Ms. Hernandez] . . . do differently because she wasn't challenged." (Tr. 353). Ms. Hernandez appeared to be "upset" about the fact that she had been treated differently. (Tr. 354). For her part, Ms. Hernandez testified that she was "shocked" that she was not challenged, since she performed the same job functions as Ms. Barraza. (Tr. 442). She also talked with Mr. de la Fuente about the situation (Tr. 448; *accord* Tr. 166-68 (de la Fuente confirming that he spoke to Hernandez just after 11:00 a.m.)).

3. Board Agents Schlabowske and Ocampo Continue Objectionable Conduct during Afternoon Polling Session

During the afternoon polling session, the Company's observer was Joseph Ackerman. (Tr. 558). Board Agent Schlabowske, Board Agent Ocampo, and Ms. Ekimovsky, the Russian translator, were all present for this afternoon session. (Tr. 559-61; Jt. Ex. 4 (matching these descriptions to names)). As he did in the morning, Petitioner's observer had the handwritten red list of names. (Tr. 562 (Ackerman), 854 (Zavala second examination); Er. Ex. 17). As in the morning, the list was on the table in front of Petitioner's observer during the voting and in the presence of voters. (Tr. 562-63 (Ackerman); *see also* Tr. 740 (Adan testifying that he had "another list for the afternoon"; Er. Exs. 17-18). Also just as in the morning session, as each voter approached, both observers checked off names on the white *Excelsior* list while Petitioner's observer made markings on the red list. (Tr. 564 (Ackerman); Tr. 740 (Adan)).

When the name of a voter who had entered the polling area appeared on the red list, Board Agent Ocampo would point out the challenges to Petitioner's observer (Tr. 565-66), just as Ms. Barraza and Ms. Hernandez had reported Board Agent Ocampo had done with Ms. Barraza's

challenge in the morning. (*Compare* Tr. 343, 385, 450-51 *with* Tr. 565-66). Board Agent Ocampo would lean over the observers' shoulders, point to the red list, and communicate with Petitioner's observer in Spanish. (Tr. 565-67 (Ackerman direct), 603-04 (Hearing Officer examination)). Board Agent Ocampo actually was touching the red list when she pointed. (Tr. 604). Board Agent Ocampo never translated what she was doing or saying. (Tr. 567). Mr. Ackerman, who does not speak Spanish, could not understand them, and felt "uncomfortable because . . . nobody was helping [him] or giving [him] any assistance" and he "just didn't know what was going on." (Tr. 566-67).

D. Board Agent Misconduct at Niles

1. Board Agent's Substantive Assistance to Petitioner's "Shy" Observer

The Niles polling session opened at 10:00 a.m., and the Region and the parties appeared for a pre-election conference approximately half an hour before, at 9:30 a.m. (Tr. 74-75). Among others, the Board Agent, Elizabeth Galliano; one of the Company's attorneys, Amy Moor Gaylord; the Company's human resources assistant, Luis Soto; the Company's observer, Joe Ackerman; Ms. Zavala; and Petitioner's observer, Juan Gomez, all attended the conference. (Tr. 75). Mr. Ackerman spoke English, but not Spanish and Petitioner's observer spoke Spanish but not English. (Tr. 76-77). Accordingly, Board Agent Galliano instructed both of them in their preferred languages. (Tr. 76-77, *see also* Tr. 554 (Ackerman)). During the Niles polling period, Petitioner's observer had a red list of challenges. (Tr. 554-55; Er. Ex. 18; Tr. 96-97 (Gaylord testifying that Petitioner's observer had the red list at both the pre- and post-polling conferences), 847-48 (Zavala second examination)). The observer marked the red list during the polling. (Tr. 555-56; *see also* Er. Ex. 18 (containing marks)).

The polls were open from approximately 10:00 a.m. until 11:30 a.m., and Ms. Gaylord, along with Mr. Ackerman and Mr. Gomez, attended the closing of the polls. (Tr. 78). During this meeting, Board Agent Galliano handed Ms. Gaylord a handwritten list that Board Agent Galliano had prepared containing the names of challenged voters, the reasons why they were being challenged, and whether the Board or Petitioner was challenging them. (Er. Ex. 12; Tr. 78, 87-89).

In the subsequent conversation about the list that Board Agent Galliano had prepared, Ms. Gaylord testified that Board Agent Galliano had assisted Petitioner's observer with his challenges "because he was shy," did not verbalize his challenges, and that she had "continue[d] to prompt him throughout the voting process." (Tr. 88; *accord* Tr. 823-24 (Zavala testifying that Gomez was "a shy individual")). The list that Board Agent Galliano had prepared corroborated this point. (*Compare* Er. Ex. 12 *with* Er. Ex. 13). Unlike the Morton Grove facility, where Petitioner offered almost no valid reasons for any challenges (*see* Er. Ex. 13), every challenge at the Niles facility included detailed, legally sufficient reasons for challenges, even to the point that the list Board Agent Galliano prepared included citations to the proper sections of the National Labor Relations Act itself. (*See* Er. Ex. 12). Conversely, the "red list" for Niles that the observer used contained no reasons, only names. (Er. Ex. 18). That Board Agent Galliano had sufficient knowledge to make such detailed, legally sufficient challenges on her own is unsurprising, since she had served as the hearing officer for the 2009 Decision and had heard testimony about all of these positions, and even some of the employees such as Mr. Ackerman, the Company's Niles observer. (Er. Ex. 2, at 1 (identifying Galliano as the hearing officer), 106-09 (testimony about Mr. Ackerman)).

As discussed above, at Morton Grove, where the Board Agents assisting Petitioner's observer in making challenges did not provide the reasons for them, all of the challenges were for vague, insufficient reasons based on the physical location of an employee's workstation ("Office

Employee") or no reason at all ("Unknown" or "Other"). (*See* Er. Ex. 13). Clearly, whatever her motive might have been, Board Agent Galliano provided improper and objectionable assistance to Petitioner's "shy" observer at Niles, conduct that raises the inference that she was biased against the Company because unlike Petitioner's observer, Mr. Ackerman received no assistance from her.

2. Lost Challenge Envelope and Ballot of Voter Brianne Sadowski

Prior to the hearing, the parties stipulated that "the Company placed Brianne Sadowski on the *Excelsior* list, [and] that the Union did, in fact, challenge her vote at Niles." (Jt. Ex. 1). Consistent with the parties' stipulation, Mr. Ackerman, the Company's observer, recalled that Ms. Sadowski came in to vote, that Petitioner's observer challenged her, and that he and the other observer "checked her and she voted." (Tr. 557 (direct), 600 (Hearing Officer examination)). Mr. Ackerman testified that neither Ms. Sadowski nor any other voter left the polling area after being told their vote was being challenged. (Tr. 557). He did not recall anything different occurring with Ms. Sadowski's challenge than any of the others. (Tr. 558). Only a challenge to Alla Rubina was handled differently because Petitioner's observer forgot to challenge her. (Tr. 557 (Ackerman direct), 599 (Hearing Officer examination)).

According to Board Agent Galliano's list, Ms. Sadowski was challenged as a Graphic Designer, a position not listed within the scope of the unit. (Er. Ex. 12; *see also* Er. Ex. 10). Although the challenged ballot appeared on Ms. Galliano's list, Ms. Sadowski's name was left off the master list of challenged ballots that the Region provided to Petitioner and the Company on Friday, June 20 and Tuesday, June 24 (revised with typos corrected). (Er. Ex. 13; Tr. 97-98, 101-02). Both parties raised the issue of this missing ballot with the Region. (Er. Ex. 14; Tr. 102-03). However, Board Agent Schlabowske informed the parties that the Region could not find Ms. Sadowski's ballot. (Er. Ex. 14). Board Agent Schlawbowske "apologize[d] in advance if this was

an error on [her] part." (Er. Ex. 14). As of the date of this filing, the Region has not located Ms. Sadowski's challenged ballot. The Company cannot know if other ballots (challenged or not) may be missing as well. Testimony by Petitioner's Recording Secretary and Business Agent was that she and Secretary/Treasurer John Howard observed that Board Agents "dropped the [ballot] boxes off and left" after transporting them from Niles to Morton Grove. (Tr. 865).

At the hearing several days after entering into the stipulation, upon realizing during testimony the legal significance of this lost ballot, Petitioner's attorney attempted to argue on the record that a stipulation that Petitioner "did, in fact, challenge [Ms. Sadowski's] vote" meant instead that Petitioner would have challenged Ms. Sadowski's vote had she actually voted. (*See* Tr. 83-84). This argument is nonsensical. Petitioner's attorney herself contacted the Region when Ms. Sadowski's name was missing from the list of challenged ballots. (Er. Ex. 14). If Petitioner had not "in fact, challenge[d] her vote" (because Ms. Sadowski had fled the polling area instead of voting or for some other reason), Petitioner would have had no reason to "raise[] the issue of employee Brianne Sadowski's challenge ballot" with Board Agent Schlabowske the next day. (Er. Ex. 14). Clearly, Petitioner "did, in fact, challenge her vote," just as it stipulated. Problematically, the Region appears to have lost track of this challenged ballot and compromised the sanctity of the election.

QUESTIONS PRESENTED

1. Whether the Hearing Officer violated Lifeway's due process rights by permitting an insufficiently skilled Spanish-language translator to repeatedly mistranslate and fail to translate the proceedings, despite the Company's objections, and refused to permit the Company an opportunity to challenge inaccurate translations. (Exceptions 4, 5, 32, 34-43, 62-75).

2. Whether the Hearing Officer violated Lifeway's due process rights by conducting substantive proceedings off the record and refusing to put the proceedings on record, over the objections of the Company. (Exceptions 1, 2, 6, 9).

3. Whether the Hearing Officer violated Lifeway's due process rights by, over objections, allowing Petitioner's witness to testify a second time in contradiction to her prior testimony, coaching Petitioner on evidence, and presenting arguments for Petitioner. (Exceptions 8, 9, 14, 15, 18, 20, 23-30, 72).

4. Whether the Hearing Officer violated Lifeway's due process rights by relying on the wrong legal standards, repeatedly misunderstanding and confusing key testimony from both parties, and by issuing a Report that is disorganized, contradictory, and fails to cite to any part of the record. (Exceptions 7, 8, 10-84).

5. Whether the Hearing Officer erred when he found that Petitioner's instructions to its observers not to allow "any women to vote," to challenge all drivers and its decision to make wholesale challenges to voters, like shipping logistics and drivers expressly included in the 2009 Decision and Stipulated Unit, did not destroy laboratory conditions and was not objectionable conduct. (Exceptions 8-13, 16-34, 37-43, 62-67, 72).

6. Whether the Hearing Officer erred when he found that misconduct by Board Agents at Morton Grove, including prohibiting eligible voters from casting votes and then removing them from the polling area in view of other voters, permitting Petitioner's observers to maintain and mark the "red lists," and giving substantive assistance to Petitioner's observers during the morning and afternoon sessions at Morton Grove did not destroy laboratory conditions and was not objectionable conduct. (Exceptions 8, 9, 31-45, 59-82).

7. Whether the Hearing Officer erred when he found that Board Agent Galliano's substantive assistance to Petitioner's "shy" observer at Niles did not destroy laboratory conditions and was not objectionable conduct. (Exceptions 8, 9, 21, 22, 31-33, 46-51, 72).

8. Whether the Hearing Officer erred when he found that the Region's loss of the challenge envelope and ballot of voter Brianne Sadowski and failure to maintain custody of ballot boxes did not destroy laboratory conditions and was not objectionable conduct. (Exceptions 8, 9, 49, 51-58, 76-78).

ARGUMENT

I. The Hearing Officer violated Lifeway's due process rights by permitting an insufficiently skilled Spanish-language translator to repeatedly mistranslate and fail to translate the proceedings, despite the Company's objections, and refused to permit the Company an opportunity to challenge inaccurate translations.

Throughout the hearing, both parties' witnesses, attorneys, and representatives, and even the Hearing Officer himself complained about the insufficiently skilled Spanish-language translator, Raul Montes. Mr. Montes was unable to translate witness testimony directly while it was being spoken, except for the most basic short phrases or sentences. Instead, Mr. Montes would attempt to jot down notes of what a witness was saying, and, when the witness finished, Mr. Montes would attempt to paraphrase what the witness said. (*E.g.*, Tr. 623 (Montes only able to go phrase-by-phrase because he cannot keep up, admits he "[didn't] have a translation")). Mr. Montes mistranslated or failed to translate several material statements by witnesses.

For both pre- and post-election hearings, where foreign language witnesses are required, the Board's policy is to secure and pay for interpreter services. *See Solar Int'l Shipping Agency, Inc.*, 327 NLRB 369, 370 (1998) (citing 1978 NLRB Gen'l Counsel Memo.); *see also George Joseph Orchard Siding, Inc.*, 325 NLRB 252, 256 (1998) (holding General Counsel must provide and pay for interpretation of the employer's witnesses' testimony for an unfair labor practice trial).

The General Counsel requires hearing officers to take care to ensure that the translation includes the full answer of the witness, that the witness appears to agree with the translation, and that complex and compound questions are avoided. *See* NLRB Gen'l Counsel Memo., OM 06-75 (June 26, 2006). Furthermore, a hearing officer should ensure that witnesses understand the questions asked to them through an interpreter, that the interpreter understands the nuances of the questions, and the witnesses' answers are accurately interpreted. *See, e.g., NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118, 1121 (7th Cir. 1986). A hearing office or judge must have accurate and complete translations of witness testimony in order to properly determine the outcome of a hearing. *See Coastal Insulation Corp.*, 354 NLRB 495, 497 (2009) (ALJ gave opposing parties opportunity to challenge inaccurate Spanish translations during unfair labor practice hearing); *see also In Re Pan Am. Grain Co., Inc.*, No. 24-CA-8570 (JD-59-03) (NLRB Div. of Judges), 2003 WL 21251892 at n.10 (May 23, 2003) (finding literal translation of Spanish-speaking witness's testimony did not accurately reflect witness comments).

At the hearing, the Hearing Officer did not take care to ensure that Mr. Montes's translations were accurate, even noting at one point that he was "not sure [he] should be questioning the interpreter" (Tr. 638). The Hearing Officer repeatedly refused to allow the Company an opportunity to challenge inaccurate translations, ultimately concluding that he would "rely[] upon the expertise of the interpreter" instead. (Tr. 734). Mr. Montes's mistakes ranged from basic improper verb/subject agreement and gender pronouns (Tr. 500 ("the majority of that group were in the red list"), 506, 529-30 (referring to a woman as "him" when the witness referred to the person as "her"), 646 ("none of the woman work with us"); to simply failing to translate what witnesses said. (Tr. 518 (Company counsel objecting that both witness and Montes spoke in

Spanish and Montes did not translate it into English[7]), 732 (Company counsel objecting that Montes did not understand the question he tried to translate), 733-35 Company counsel objecting that Montes did not translate the entire statement from Spanish)).

The transcript is rife with errors by Mr. Montes. He mistranslated words, correcting himself as he went without clarification as to which of his multiple answers was correct. (Tr. 618, 645, 730). He frequently failed to translate the witness's testimony because he could not take notes fast enough. (Tr. 620, 635 ("Can you repeat that again?"), 635 ("Could I ask you to use phrases?")), an issue that the Company's counsel objected to on several occasions. (*E.g.*, Tr. 641 (noting that Montes "had lost track of what was being said" and observing that Montes could only translate "phrase by phrase"), 733-35 (Company counsel objects that Montes left words out while paraphrasing what witness said)). At times, he simply could not translate anything at all. ("I don't have a translation for that.") (Tr. 623). At one point, Mr. Montes's shortcomings led the Company to provide him with his own copy of an exhibit, so he could translate from written words rather than translating what Petitioner's witness actually said in Spanish. (*See* Tr. 627).

At a critical juncture during testimony by Petitioner's witness, Ms. Zavala, about her instructions to observers not to allow "any women to vote" and to challenge all the drivers, Mr. Montes repeatedly mistranslated Ms. Zavala's testimony, to which all of the parties ultimately objected. (Tr. 620-22, 636 (Zavala: "That wasn't what was said"), 640 (Zavala offering her interpretation of what Montes said); *see also* Tr. 828 (Zavala complaining the following day about inaccuracies in Montes's previous translations)). Unlike Petitioner, when the Company's attorneys and representatives raised their concerns, the Hearing Officer brushed them off. For instance, while the Hearing Officer invited Petitioner's witness to offer her interpretations of the Spanish

[7] Two of the Company's attorneys (Mr. Hass and Ms. Zdravecky) as well as both Petitioner's representative (Ms. Zavala) and the Company's representative (Mr. de la Fuente) speak Spanish.

translation (Tr. 640), he ignored the Company's representative, Mr. de la Fuente (Tr. 636), and the Company's attorney, Ms. Zdravecky (Tr. 639), both of whom attempted to challenge Mr. Montes's translation and, then, Petitioner's interpretation of it.

Not that Petitioner's explanation helped matters: the Hearing Officer complained that his "understanding of the second interpretation" by Mr. Montes and explained by Ms. Zavala "leaves a lot of room open" as to what was actually said in Spanish. (Tr. 642). Despite observing that the interpretation was lacking, he directed the parties to continue anyway, still refusing to address the Company's objections or to provide the Company an opportunity to challenge the translation. (Tr. 642). After only a handful of questions, the Hearing Officer stopped the proceedings again, asking that Mr. Montes translate entire sentences because "the interpretation we are getting is broken English almost." (Tr. 644). Mr. Hass, the Company's attorney, reminded the Hearing Officer that Mr. Montes was only capable of translating longer passages phrase by phrase. (Tr. 644). Mr. Montes explained that he was having trouble understanding what was being said. (Tr. 644-45). The Hearing Officer asked that the translation be read back "because [he] was still confused." (Tr. 645). Even after hearing Mr. Montes's translation again, the Hearing Officer could only "guess" that he understood what was said and noted again that "it does seem like broken English." (Tr. 645).

Later, after the Hearing Officer himself noted that the translator regularly alternated between singular and plural (*see* Tr. 736), Mr. Hass, the Company's attorney, again had to object when Mr. Montes mistranslated a reference to more than one person as a reference to a single person. (Tr. 749-50). Mr. Hass explained what he heard and attempted to challenge Mr. Montes's translation. (Tr. 75). Once again, the Hearing Officer disregarded the Company's objection and declined to give it an opportunity to challenge the translation. (Tr. 750). When Mr. Montes attempted to address the Company's objection, the Hearing Officer interrupted and then moved on

with a follow-up question instead. (Tr. 750). He never responded to the Company's objection or afforded it an opportunity to challenge the translation or correct the record. (Tr. 750-51).

Nonetheless, despite objections from both sides, Mr. Montes's own expressed limitations, and everyone (including the Hearing Officer's) uncertainty about the translations, the Hearing Officer took no action to ensure that the interpreter understood the nuances of the questions or that the witness's answers were accurately interpreted. He never provided the Company an opportunity to challenge the translations and interpretations. The Board's precedent and guidance to hearing officers and ALJs cited above is clear that hearing officers must provide parties with these opportunities. The Hearing Officer's repeated failures to do so materially altered the record on several key points. The Hearing Officer's actions called into question the integrity and accuracy of the transcript and every portion of his decision that relied on it.

II. The Hearing Officer violated Lifeway's due process rights by conducting substantive proceedings off the record and refusing to put the proceedings on record, over the objections of the Company.

Throughout the hearing, the Hearing Officer required the parties to conduct lengthy, substantive off the record discussions with him about aspects of the case, evidentiary disputes, admissibility and hearsay discussions, and Lifeway's objections to the conduct of the election. During these off the record discussions, the Hearing Officer would frequently make preliminary rulings, counsel the parties on stipulations, advise Petitioner what evidence he wanted it to present to rebut Company evidence, and discuss the merits of Lifeway's objections. Even when Lifeway's counsel specifically requested that the Hearing Officer enter these discussions on the record, the Hearing Officer refused. (*See* Tr. 80, 141, 488, 628-29, 690, 695, 771, 813 (allowing Company to finally make on-record request not to have further off-record discussions)). During one such conversation, for example, Hearing Officer Preston and the parties discussed Ms. Sadowski's "lost

ballot" and the disputed content of a stipulation. Prior to going off the record, the parties had not discussed Ms. Sadowski with the Hearing Officer. (*See* Tr. 1-80). After coming back on the record, the Hearing Officer referred to the off the record deliberations he had with the parties and specifically mentioned Ms. Sadowski, the topic of the off the record discussion. (Tr. 80-81). This pattern of requiring deliberations over evidentiary matters continued. For instance, at the end of the third day of hearing, the Hearing Officer specifically told Lifeway that on the fourth day "before we go on the record with any witnesses from Petitioner, first I'll want to discuss with the Employer especially as to each of the objections." (Tr. 690). The Hearing Officer then took the parties off the record and conducted additional substantive discussions that night, followed by another approximately 45 minutes of discussions off the record the following morning before he would allow the parties to go on the record. (Tr. 694-95 (court reporter noting that proceedings began at 9:30 a.m., but did not go on the record until 10:06 a.m.); *accord* Tr. 695 (Hearing Officer observing that "[w]e had some off the record discussions late yesterday and before coming on the record today as to certain individuals . . . .")).

By doing so, and by ignoring Lifeway's repeated requests to have these discussions on the record, the Hearing Officer ignored the Board's guidance that when a hearing officer makes inappropriate comments off the record, and counsel requests that the hearing officer make those comments a part of the record, the hearing officer should do so. *See Roto Rooter*, 288 NLRB 1025, 1026 n. 2 (1988) (finding counsel for the Respondent should have immediately requested improper comments allegedly made by hearing officer off the record be repeated on the record); *see Control Servs., Inc.*, 315 NLRB 431, 434 (1994) ("A timely objection by [counsel] would have provided [the hearing officer] opportunity to explain [his] actions on the record at the time."); *see Pioneer Natural Gas Co.*, 253 NLRB 17, 17 n. 1 (1980) (holding that to make a timely objection to off the

record comments, it was incumbent upon counsel to object in a timely fashion). The Hearing Officer failed to do so here, and his actions called into question the completeness of the transcript and the integrity of his decision.

III. The Hearing Officer violated Lifeway's due process rights by, over objections, allowing Petitioner's witness to testify a second time in contradiction to her prior testimony, coaching Petitioner on evidence, and presenting arguments for Petitioner.

Over numerous objections, the Hearing Officer allowed Petitioner's witness, Ms. Zavala, to testify a second time on a second day to contradict her prior, damaging testimony about Petitioner's actions and instructions to observers not to allow "any women to vote," to challenge all drivers in the days leading up to the election. During the hearing, the Hearing Officer also frequently coached Petitioner on its evidence and repeatedly presented arguments for Petitioner. This conduct violated the Company's due process rights by depriving it of the opportunity to present its case to a neutral hearing officer.

Most alarmingly, the Hearing Officer violated the Company's due process rights by allowing Ms. Zavala to testify on a second day (and, presumably, after being prepared for that testimony) to directly contradict her prior testimony in the case and then crediting her contradictory testimony given during that second day. (*E.g.*, HOR 9-10). Ms. Zavala took the stand during the Company's case and testified at length about her actions leading up to the election. (Tr. 615-69). Petitioner's attorney had a full opportunity to cross examine her on these topics, and the Hearing Officer examined her as well. (Tr. 670-89).

After having an opportunity to prepare her testimony overnight, the Hearing Officer allowed Ms. Zavala to retake the stand the next day. (Tr. 825). The Company immediately objected to Petitioner's attempt to have Ms. Zavala testify again on issues she had testified to previously. (Tr. 831-32). The Hearing Officer recognized that Petitioner was "rehashing this part," but when

Petitioner's attorney said she "d[id]n't know exactly what was said yesterday," the Hearing Officer let her begin presenting Ms. Zavala's contradictory testimony. (Tr. 832). After a few questions, it was apparent that Petitioner intended to have Ms. Zavala testify to "the exact same thing that we covered yesterday, except . . . this time there's been time to prepare to respond differently." (Tr. 836). The Hearing Officer overruled the objection. (Tr. 837). The Company persisted in its objections, again noting that Ms. Zavala was testifying on the same topics and giving contradictory answers. (Tr. 841). The Hearing Officer agreed, but overruled the objection because it was "clear in the record she has a different belief" and he was not going to stop her from testifying about "what she's believing right now," even if it contradicted her prior testimony. (Tr. 841).

After Petitioner's counsel was permitted to testify briefly without taking the stand or being subject to cross examination (Tr. 841-42), the Company objected a *fourth* time about Ms. Zavala's "attempt to directly contradict what she clearly testified to" the day before. (Tr. 842). The Hearing Officer agreed that Ms. Zavala had testified on the topic the day before and was now testifying "counter to certain testimony yesterday," but still overruled the Company's objection. (Tr. 842).

After allowing Petitioner's counsel to testify briefly, again without taking the stand or being subject to cross examination (Tr. 842-43), the Company continued to lodge objections that the Hearing Officer summarily rejected, even though he recognized that the record would show contradictions. (*See* Tr. 844). The Hearing Officer continued to allow Ms. Zavala to contradict her prior day's testimony, even allowing the contradictions to extend to hearsay about what Company officials and observers said at a pre-election conference. (Tr. 860-63 (overruling Company objections)). When Ms. Zavala completed her contradictory testimony, the Company made its *sixth* objection. (Tr. 893). Again, the Hearing Officer acknowledged that Ms. Zavala had completely contradicted her prior testimony, but that "it is what it is" and she had now "given more than one

account" in her two trips to the stand. (Tr. 893). He overruled the objection. Yet, in his Report, there is no mention of any of these contradictions or his acknowledgment of them—just his acceptance of Ms. Zavala's "corrected" testimony without comment. (HOR 9-10).

The Hearing Officer also repeatedly coached Petitioner on what evidence to present and how to present it, and openly advocated Petitioner's positions. For instance, when Petitioner's witness stopped giving specific answers to questions and switched to giving more general answers, the Hearing Officer stopped Petitioner's counsel and "point[ed] out" that fact, inviting her to then continue with his guidance in mind. (Tr. 736; *see also* Tr. 727-28 (over objections, allowing Petitioner to repeatedly prompt this same witness for additional testimony)). Later, when Petitioner wanted to introduce its ninth exhibit, the Hearing Officer explained how he planned to apply the evidence and asked Petitioner's attorney to provide suggestions on how he should apply it. (Tr. 769). When the Company objected that the documents spoke for themselves, the Hearing Officer ignored the objection and directed Petitioner's counsel to continue explaining how to apply the evidence. (Tr. 769). Minutes later, the Hearing Officer explained what argument Petitioner was making and how he was applying the evidence to that argument, and then again prompted Petitioner's counsel to explain what else she wanted the evidence to show. (Tr. 773). Whenever Petitioner strayed from the evidence that the Hearing Officer wanted Petitioner to introduce, he would prompt it on what to offer, explaining for example that he was "not sure we need evidence" on a particular matter and telling Petitioner to focus on adducing evidence on the witnesses' "state of mind" instead. (Tr. 809). The Hearing Officer did the same with simple matters. For instance, after the Company objected to a leading question, the Hearing Officer ignored the objection and instead prompted Petitioner's witness that the leading question had a yes or no answer. (Tr. 822).

When Petitioner's counsel did not make an effective argument, the Hearing Officer simply argued in her place, offering long soliloquies on the record about what arguments Petitioner was making, how to properly use the exhibits and evidence to support those arguments, and how to apply that evidence to the overall case. (Tr. 907-09). When the Company objected to the Hearing Officer making arguments for Petitioner, he overruled the objection and simply advised the parties that Petitioner would be "allowed to make the argument" that he had just laid out for it. (Tr. 907-09; *see also* Tr. 626, 632 (Hearing Officer making premature ruling on what the evidence showed and concluding what Company had failed to show before Company had finished presenting its evidence and case)). The Hearing Officer's prompting, coaching, and advancement of actual arguments on behalf of Petitioner were wholly improper, demonstrated substantial bias and violated the Company's due process rights to present its case before a neutral hearing officer.

IV. The Hearing Officer violated Lifeway's due process rights by relying on the wrong legal standards, repeatedly misunderstanding and confusing key testimony from both parties, and by issuing a Report that is disorganized, contradictory, and fails to cite to any part of the record.

The Hearing Officer's violations of the Company's due process rights were not limited to his advocacy on behalf of Petitioner. The Hearing Officer also asked numerous leading questions, mischaracterized the prior testimony of witnesses, and confused witnesses with inaccurate questions founded on his misunderstandings and confusion about key evidence and testimony. His Report is disorganized, contradictory, and, most importantly, fails to cite to any part of the record. Accordingly, the Company is materially prejudiced in responding to the Hearing Officer's conclusions. While some of the mistakes are obvious from both the record and the Report and are discussed herein, the Company is for the most part left to guess what the Hearing Officer meant and what parts of the record he believed supported his conclusions. (*Compare, e.g.*, HOR 27 (citing election notices that allegedly advised employees as to the identity of Board Agents) *with*

Er. Exs. 8, 10 (no Board Agents identified)); *compare* HOR 16-17 (Hernandez and Barraza testified to voting at 9:30 with the first group of all women that Board Agent Schlabowske escorted from the polling area) *with* (Tr. 334, 419 (Hernandez and Barraza testifying that they voted between 10:30 and 11:00 a.m. with a mixed group of both men and women)).

The Board and courts long have held that voting in Board cases must be free of any impropriety, and that employees must be permitted to cast their ballots in secret, in complete freedom, and without fear of reprisal or discipline. Activity that reasonably can be construed as improper is proscribed whether or not the activity is, in fact, improper. *Masonic Homes of Cal.*, 258 NLRB 41, 48 (1981) (citing *Piggly Wiggly*, 168 NLRB 792 (1967) and *A. D. Juilliard and Co.*, 110 NLRB 2197 (1954)). In many cases, the Hearing Officer's repeated misunderstandings and confusion about key testimony, failure to cite to the record, and frequent off the record discussions, combined with the sharply limited post-hearing briefs he demanded (due to arbitrary limits he placed on their content and length (Tr. 918-19)), meant that his decision applied the wrong or non-existent legal standards. (*E.g.*, HOR 2, 6, 10-13, 16 (requiring actual evidence of interference with or effect on voters and/or their exercise of Section 7 rights); HOR 12 (requiring evidence of "animus" or "malicious intent" by Petitioner); HOR 18 (applying an "as egregious" standard); HOR 6 n.3, 21-23 (disregarding Board policy of preferring non-Board employee testimony, documentary evidence instead of subpoenaed Board employee testimony); HOR 28 (relying on hypothetical outcomes tests instead of record evidence); HOR 29 (applying a "momentary departure" exclusion)). By applying the incorrect or non-existent standards, the Hearing Officer reached erroneous and unsupported conclusions. These issues also led to numerous factual errors and misstatements in the Report as well.

For example, one important evidentiary point was Petitioner's Morton Grove observer's statement during the morning session that "the majority" of a group of people who had come into the room (but had not yet been challenged) were on Petitioner's improperly used and maintained "red list" of voters, leading Board Agent Schlabowske to announce that the group could not vote and to escort them from the room before they could be properly challenged. (Tr. 500-01, 510, 512, 521). The Hearing Officer forgot about this reference to "the majority" (who were never challenged). The Company objected, and the Hearing Officer admitted that he had been mistaken (Tr. 521 ("You are refreshing my memory, yes . . . . He certainly said that."), but he never corrected himself, asking another question based on the same erroneous recollection. (*See* Tr. 521). As a result, in his questions at the hearing and again in his Report, the Hearing Officer confused this first group's removal without being challenged with other voters at approximately 11:00 who were challenged. (*See* Tr. 520-21, 750-51 (asking question about challenges, not group of voters initially being led out of the room); HOR 15-17 (confusing first group of women with mixed group of men and women containing Mr. Deborja, Ms. Hernandez, and Ms. Barraza that voted later).

Another example of the Hearing Officer's misunderstanding of the evidence related to Board Agent Ocampo's assistance to Petitioner's observer at Morton Grove in the morning and afternoon polling sessions. Mr. Ackerman, the Company's afternoon observer, testified that Board Agent Ocampo only touched the red list that was sitting on the table with her finger when she pointed to it. (Tr. 604). Mr. Ortiz, the morning observer, testified that Board Agent Schlabowske held the red list during the pre-election conference. (*See* Tr. 495). Confusing the two, the Hearing Officer later asked another witness to confirm whether Board Agent *Ocampo* "ever h[e]ld" the red list, and then relied on the answer to that question in his Report. (Tr. 748; *see* HOR 28).

The Hearing Officer also confused the times when different groups voted. In his Report, he credited testimony that the first group of all women including Aneta Leja, Inna Linton, Natalya Nazimok, and Marina Kraft voted just after the polls opened at 9:30 a.m. (HOR 16; *accord* (Tr. 500-01, 510, 512, 521 (group was all women, entered just after polls opened)). He then credited the testimony of Sara Hernandez and Edith Barraza (*e.g.*, HOR 28), but misstated their testimony in his Report. Ms. Hernandez and Ms. Barraza both testified, corroborated by Mr. de la Fuente, that they voted between 10:30 and 11:00 a.m. with a mixed group of both men and women. (Tr. 334 (Barraza direct), 419 (Hernandez direct)). Ms. Leja, Ms. Linton, and Ms. Nazimok, but apparently not Ms. Kraft or any of the other voters from the first group, returned to vote later in the morning with Mr. Deborja, Ms. Barraza, Ms. Hernandez, and others. (Tr. 334 (Barraza direct), 419 (Hernandez direct)). The Hearing Officer confused these facts in his Report, erroneously concluding without any citation to the record that the evidence showed both groups voted at the same time. (HOR 17, 28-29).

V. The Hearing Officer erred when he found that Petitioner's instructions to its observers not to allow "any women to vote," to challenge all drivers and its decision to make wholesale challenges to voters, like shipping logistics and drivers expressly included in the 2009 Decision and Stipulated Unit, did not destroy laboratory conditions and was not objectionable conduct.

The Hearing Officer erred when he found that Petitioner's conduct was not objectionable and did not destroy laboratory conditions when Petitioner, according to its own witness, challenged voters it had specifically stipulated to be eligible on multiple occasion. There is no plausible explanation for Petitioner's conduct other than that it acted for the purpose of chilling these employees' exercise of their Section 7 rights. Petitioner stipulated that eligible voters were "[a]ll full-time and regular part-time production/maintenance, production, maintenance, and shipping/receiving employees employed at [the Employer's Skokie, Morton Grove, and Niles

facilities]; but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act." (Er. Ex. 10, at 3-4). Yet, Ms. Zavala communicated with Lifeway employees in person, via text message and on the telephone regarding Petitioner's plans to challenge voters. (Tr. 615-17, 824; Er. Ex. 19). She told the observers that Petitioner" was "challenging the drivers." (Tr. 824). She "specifically told them" that Petitioner would be "challenging the women," not because of their clerical duties, but because Zavala saw that those women "went into the office" and wore "regular clothes." (Tr. 824). Even when an observer twice questioned whether these types of challenges were appropriate (Tr. 634, 646; Er. Ex. 21), Ms. Zavala persisted, reiterating that the observer "should challenge women" and drivers. (Tr. 833).

Just as Ms. Zavala had planned, Petitioner challenged the ballots of the shipping logistics employees—save for Ms. Hernandez whom Petitioner accidentally left off the challenge list by accident (Tr. 683; *compare* Pet'r Ex. 8 *with* Er. Exs. 17-18) and Ms. Rubina whom Petitioner's observer forgot to challenge (Tr. 557, 599)—and drivers, among others, in direct contravention of the stipulated election agreement. "A petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit." *Odwalla, Inc.*, 357 NLRB No. 132 (2011); *see also A.S.V. Inc.*, 360 NLRB No. 138 (2014) ("no rational basis for excluding some assembly employees while including other assembly employees"). Put another way, Petitioner intended to chill these employees from exercising their Section 7 rights to vote by challenging their ballots. The Hearing Officer correctly found that Petitioner "challenged the ballots of [certain] employees based in large part on their work location." (HOR 12). However, he erred by not finding that this conduct, as well as challenges to drivers that Petitioner admitted were improper (*see* Tr. 834), challenges based on "Unknown" or "Other" reasons (Er. Ex. 8), and challenges to other employees clearly included in the unit destroyed laboratory conditions by chilling these employees

from exercising their Section 7 rights. (Tr. 534-51; *accord* Tr. 175-77; *see also* Er. Ex. 2, at 106-09; Er. Ex. 1, at 3). Petitioner's actions gave voters the impression that it could control who could vote and who could not. *Monroe Mfg. Co.*, 200 NLRB 62 (1972).

In *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003), the Board affirmed an ALJ who had summarized this issue succinctly:

> the whole purpose of an election agreement is to resolve, to the extent practicable, unit and eligibility issues. This is done to avoid the necessity of holding a hearing either before or after the election is conducted to resolve issues which have been agreed upon. Thus, unless a stipulation, by its terms, violates some public policy, there would be no purpose served in permitting parties to make agreements, while at the same time permitting either side to withdraw from the stipulation when events didn't go their way.

Id. at 1049; *accord, e.g.*, *White Cloud Prods.*, 214 NLRB 516, 517 (1974); *Montefiore Hosp. & Med. Ctr.*, 261 NLRB 569 (1982). Petitioner's attempts to effectively withdraw from the stipulation and to cherry-pick challenges based on wholly impermissible factors can be viewed as nothing but an attempt to chill the exercise of employees' Section 7 rights. Petitioner's actions described above individually and together could have affected the election result. *E.g.*, *S.T.A.R., Inc.*, 347 NLRB 82, 84 n.7 (2006) (finding that union misstatements were objectionable because they "could have affected the election result").

The Board's regulations require that parties provide "good cause" for any challenges to a voter's eligibility. 29 C.F.R. § 102.69. A valid challenge for "good cause" must raise the eligibility issue with specificity and deal with the duties that prompt the challenge. *Nichols House Nursing Home*, 332 NLRB 1428, 1429 n.6 (2000); *see also Wells Fargo Alarm Servs.*, 289 NLRB 562 (1988) (eligibility question must be "properly raised" by challenger); *NLRB Outline of Law & Proc. in R Cases* (2012), § 22-115 (challenges must "deal[] with the duties that prompt the challenge"). Additionally, Section 11338.2(b) of the R Case Casehandling Manual says, "[t]he

reason for the challenge should be stated at the time the challenge is made." Section 11338.3 requires the Board Agent to include "the reason given for the challenge" on the stub of a challenged ballot envelope. By challenging voters based on the perceived location of their workspaces, notwithstanding the stipulated unit and 2009 Decision, by not properly raising challenges based on the duties that prompted them, and by failing to provide any reason at all for challenges ("Unknown," "Other" or "Office") in complete disregard of the Board's procedures requiring good cause at the time of the challenge, Petitioner gave voters the impression that it could control who could and could not vote. *Monroe Mfg. Co.*, 200 NLRB at 62.

The evidence demonstrates that Petitioner's actions could have affected the election result. Contrary to the Hearing Officer's decision, Petitioner's conduct only need raise an inference of deterring employees from engaging in Section 7 activity. *E.g., S.T.A.R., Inc.*, 347 NLRB at 84 n.7 (noting that the Board "make[s] this finding without requiring any evidence of enforcement or that employees were actually deterred from engaging in Sec. 7 activity"). Clearly, that occurred here under any reasonable reading of the Board's standards. The Hearing Officer erred and the Board must set aside the election.

VI. The Hearing Officer erred when he found that misconduct by Board Agents at Morton Grove, including prohibiting eligible voters from casting votes and then removing them from the polling area in view of other voters, permitting Petitioner's observers to maintain and mark the "red lists," and giving substantive assistance to Petitioner's observers during the morning and afternoon sessions at Morton Grove did not destroy laboratory conditions and was not objectionable conduct.

Unlike the Niles location, where a single Board Agent conducted the polling session (Tr. 75), three representatives of the Board were present during the Morton Grove polling sessions, along with a non-Board employee hired by the Board as a translator. (Jt. Ex. 4; Tr. 612-13). The objectionable conduct started before the voting even opened. Board Agent Schlabowske informed Mr. Ortiz that Petitioner's red list was a "list of people who were not eligible to vote," not that

these employees would be challenged. (Tr. 495). Petitioner's observer kept the red list on the table in full view of all voters throughout the polling session, and marked on it as voters arrived. (Tr. 497-99 (Company), 738 (Petitioner)). "It is well settled that the only list of voters that may be maintained in Board-conducted elections is the official voter eligibility list used to check off the names of voters as they receive their ballots." *Days Inn Mgmt. Co.*, 299 NLRB 735, 737 (1990), *enforcement denied on other grounds*, 930 F.2d 211 (2nd Cir. 1991), *supplemented in part on other grounds on remand by* 306 NLRB 92 (1992) (citing numerous cases, including *Int'l Stamping Co.*, 97 NLRB 921 (1951)). "The keeping of any other list of individuals who have voted," like the red lists from Morton Grove and Niles, "is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded." *Id.*; *accord Days Inn Mgmt. Co.*, 930 F.2d 211, 211 (2d Cir. 1991) (same) (quoting underlying Board decision); *NLRB v. WFMT*, 997 F.2d 269, 277 (7th Cir. 1993) (same); *Med. Ctr. of Beaver County, Inc. v. NLRB*, 716 F.2d 995, 999 (3d Cir. 1983) (same). Contrary to the Hearing Officer's Report, "this is so even when there has been no showing of actual interference with the voters' free choice." *Days Inn Mgmt Co.*, 299 NLRB at 737.

The presence of the improper "red lists" led directly to other objectionable conduct. Shortly after the morning polling session began at approximately 9:30 a.m. (*see* Tr. 852-53; Er. Ex. 8), when the first voters (all female) entered the polling area as a group, Petitioner's observer said that "the majority of that group were (sic) in the red list." (Tr. 500-01, 510, 512, 521). Board Agent Schlabowske escorted the group of eight or nine out of the room "[b]ecause they were not eligible to vote." (Tr. 500, 502, 512-13, 519, 522-23; *see also* Tr. 154-55, 157-58, 163-64, 280-81). At that

time, other voters were waiting in line outside the polling area waiting to vote. (Tr. 510). Not all of the ejected voters returned at the time. At least some did not return until later. (Tr. 419).

The Morton Grove Board Agents continued to allow large groups to enter the polling area throughout the polling periods (Tr. 334, 420, 501), which only compounded the violations to come. The Russian interpreter—who was not a Board Agent—was distributing unused ballots to voters. (Tr. 425-26, 466). Board Agent Ocampo was actively and openly assisting Petitioner's observer in making challenges, and making challenges herself on behalf of Petitioner, a uncontroverted fact confirmed by three different witnesses in two different polling sessions. (Tr. 343, 385, 450-51, 565-66). Board Agent Treadway was taking marked ballots from voters and handling them himself. (Tr. 3446-47, 435-36). The Morton Grove Board Agents failed to keep custody of the ballot boxes. Testimony by Petitioner's Recording Secretary and Business Agent was that she and Petitioner's Secretary/Treasurer observed that Board Agents "dropped the [ballot] boxes off and left" after transporting them from Niles to Morton Grove. (Tr. 865).

Furthermore, four witnesses from both the Company and Petitioner across both polling sessions confirmed that the Board Agents neither identified themselves nor wore any identification. (Tr. 354-56 (Company), 451-52, 463 (Company) 725, 752-53 (Petitioner)). The lack of identification actually led one of the Company's observers to believe that Board Agent Schlabowske represented Petitioner. (Tr. 493-94).

The Board has developed procedures for the proper conduct of an election, and the three Morton Grove Board Agents utterly failed to comply with them in numerous respects. Election procedures are spelled out precisely in the Board's Casehandling Manual ("Manual"). Board agents should wear "Agent" badges, and observers are prohibited from wearing "Agent" badges. Manual § 11318.1. Only a Board Agent (not a Russian language interpreter from a private

company) can handle unused ballots, and unused ballots must remain in the Board Agent's personal custody at all times. *Id*. at § 11322.1. Voters leave the voting booth and they, not Board Agents, place their own ballots into the ballot box. *Id*. at § 11322.4.

The Board goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election. *Fresenius USA Mfg., Inc. & Int'l Bhd. of Teamsters Local 445, Petitioner.*, 352 NLRB 679, 680 (2008). It takes no great lengths to see that the Morton Grove polling location raised substantial doubt as to the fairness and validity of the election conducted there. The Board's election procedures are designed to ensure both parties an opportunity to monitor the conduct of the election, ballot count, and determinative challenge procedure. *Paprikas Fono*, 273 NLRB 1326, 1328 (1984). Even a single improper action taken by Board Agents, much less the host of substantial errors at Morton Grove, may compromise the fairness and validity of the election. *See Madera Enterprises*, 309 NLRB 774 (1992) (Board set aside election after Board Agents unsealed ballot envelope for administrative purposes); *see Jakel Inc.*, 293 NLRB 615, 616 (1989) (removal of a ballot from ballot bag by Board Agent compromised integrity of election process).

When Board Agent Schlabowske told employees they could not vote and sent them away from the polling area in the presence of other voters, she destroyed laboratory conditions and engaged in objectionable conduct. *Sabine Towing & Transp. Co.*, 226 NLRB 422 (1976). The Board's well-established policy gives all eligible employees an opportunity to vote. *Alterman-Big Apple Inc.*, 116 NLRB 1078 (1956). Board Agent Schlabowske should have allowed these voters to vote subject to challenge. The Board Agent essentially made the final call on eligibility, instead of allowing the Board processes (such as the hearing) to determine voter eligibility. Ordering eligible voters to leave the polling area—particularly, as here, in the presence of other eligible

voters—denies eligible employees an opportunity to vote, destroys confidence in the Board's election process, and unquestionably gives the appearance of Union bias by the Board. *Athbro Precision Eng'g Corp.*, 166 NLRB 966 (1967); *Hudson Aviation Servs.*, 288 NLRB 870 (1988). Although the Company did present proof of the effect of this bias on voters (*e.g.*, Tr. 566-67), the Board does not require an objecting party to do so. *Hudson Aviation Servs.*, 288 NLRB at 870.

The Hearing Officer dismissed the myriad deviations from the Manual and Board law, finding that none of the irregularities, even in the aggregate, compromised the integrity of the election at Morton Grove. (*See, e.g.*, HOR 29). Worse, the Hearing Officer misstated and mischaracterized the nature of the prohibition on non-Board Agents like the Russian translator handling unused ballots. The Hearing Officer miscast the standard, claiming that "only Board agents are ***supposed to*** handle unused ballots and the ballots are to remain in their custody at all time [sic]," (HOR at 29 (emphasis added)). However, the language of the Manual gives no such latitude, requiring instead that unused ballots **must** remain in the Board Agent's possession at all times. *See* Manual § 11322.1.

The Board has overturned elections over far less objectionable conduct. For example, in *Madera Enterprises*, the Board held the unsealing of a ballot envelope outside the presence of the representative parties sufficient to overturn an election because the Manual provided that "removal of the ballots for counting shall be done at the count *in the presence of the representative parties*." *Madera Enterprises*, 309 NLRB at 774 (emphasis in original). Similarly, the Manual's text regarding non-Board Agents handling unused ballots is a prohibition, not a suggestion as the Hearing Officer termed it. *See* Manual § 11322.1.

The litany of uncontroverted, objectionable Board Agent conduct at Morton Grove is staggering:

- A non-Board Agent handling unused ballots;
- Board Agents losing custody of ballot boxes (reported by Petitioner, no less);
- Board Agents allowing Petitioner to maintain and mark its own "red list" of voters in full view of voters;
- Board Agent Ocampo making challenges on Petitioner's behalf;
- Board Agent Schlabowske prohibiting eligible voters from casting votes and then removing them from the polling area in view of other voters;
- Board Agent Treadway taking marked ballots from voters;
- All of the Board Agents failing to explain challenges to challenged voters;
- All of the Board Agents failing to wear identification or identify themselves.

Any or all of these events would be sufficient to overturn the election alone. In the aggregate, the Board Agents failed to safeguard the "accuracy and security thought to be optimal in typical election situations" and their actions "raise[] a reasonable doubt as to the fairness and validity of the election." *Polymers Inc.*, 174 NLRB 282 (1969). The Board Agents' misconduct cannot now be undone or corrected, and the only remedy is a new election.

VII. The Hearing Officer erred when he found that Board Agent Galliano's substantive assistance to Petitioner's "shy" observer at Niles did not destroy laboratory conditions and was not objectionable conduct.

During the meeting after the closing of the polls in Niles, Board Agent Galliano handed the Company's attorney a handwritten list that she had prepared containing the names of challenged voters, the reasons she had provided for why they were being challenged, and whether the Board or Petitioner was challenging them. (Er. Ex. 12; Tr. 78, 87-89). In the subsequent conversation about this list Board Agent Galliano indicated that she had assisted Petitioner's observer with his challenges "because he was shy," did not verbalize his challenges, and that she had "continue[d] to prompt him [to make challenges] throughout the voting process." (Tr. 88). Petitioner conceded that its observer at Niles was a "shy individual," just like Board Agent Galliano said. (Tr. 823-24).

Tellingly, unlike the Morton Grove facility, where Petitioner offered almost no valid reasons for any challenges (*see* Er. Ex. 13), every challenge at the Niles facility included detailed, legally sufficient reasons for challenges. In fact, the list that Board Agent Galliano prepared included citations to the proper sections of the National Labor Relations Act itself, something a seasoned Board Agent would have prepared, not a "shy," non-English-speaking observer who could not verbalize his challenges. (*Compare* Er. Ex. 12 *with* 18). As discussed above, that Board Agent Galliano had sufficient knowledge to make such detailed, legally sufficient challenges on her own is unsurprising, since she had served as the hearing officer for the 2009 Decision and had heard testimony about all of these positions, and even about some of the same employees including Mr. Ackerman, a challenged voter and the Company's Niles observer. (*see* Er. Ex. 2, at 1, 106-09).

As discussed above, at Morton Grove, where Petitioner's observer did not have assistance from the Board Agents in making challenges, all of the challenges were for vague, insufficient reasons based on the physical location of an employee's workstation ("Office Employee") or no reason at all ("Unknown" or "Other"). (*See* Er. Ex. 13). Clearly, whatever her motive might have been, Board Agent Galliano provided improper and objectionable assistance to Petitioner's "shy" observer at Niles. The Board Agent's actions at the Niles facility "could reasonably be understood to indicate that the Board opposed" Lifeway in the election. *Glacier Packing Co., Inc.*, 210 NLRB 571 (1974). By assisting Petitioner's observer with challenges, the Board Agent gave voters the impression that the Board was opposed to Lifeway's position in the election.

The Hearing Officer did not—and, given the existence of Board Agent Galliano's list, he could not—find that these actions did not occur. Instead, the Hearing Officer simply assumed what the Board agent at the Niles polling location "was referring to" in contradiction to the documentary evidence regarding what that Board agent actually wrote in her own list. He also contradicted the

uncontroverted testimony presented by Lifeway's observer Joseph Ackerman, even though he specifically credited both the documentary evidence and Mr. Ackerson's testimony elsewhere in his decision. (HOR 19-21) (Tr. 74-78, 87-89, 96-97, 554-56, 823-24, 847-48) (Er. Exs. 1, 2, 12-13, 17-18). He dismissed testimony by the Company attorney as hearsay entitled to no weight and improperly penalized the Company for failing to present testimony by the Board Agent, despite the fact that the Board has precluded parties from seeking and producing Board Agent testimony in favor of testimony from other sources.

In *U.S. ex rel. Touhy v. Regan*, 340 U.S. 462 (1951), the Supreme Court recognized a federal agency head's authority to promulgate regulations restricting employee testimony in private litigation. The Board's *Touhy* regulations prohibit any present or former NLRB employee from producing Board records or providing testimony with respect to any information, facts, or other matter coming to that person's knowledge in his or her official capacity in any proceeding unless the employee has the prior written consent of the Board's General Counsel. *See* 29 C.F.R. § 102.118(a)(1). The Board maintains a "strong and long-standing policy against Board employees appearing as witnesses" as a measure to avoid the appearance of partiality. *Laidlaw Transit, Inc.*, 327 NLRB 315, 316 (1998); *see Sunol Valley Golf & Recreation Co.*, 305 NLRB 493, 495 (1991) (granting General Counsel's motion to quash subpoena *ad testificandum*). The Board's General Counsel grants requests for such testimony only under "unusual circumstances." *See id*. Requests by private parties like Lifeway for Board employee testimony are routinely rejected, even when made jointly by both parties. *See, e.g.*, *Goya Foods, Inc.*, 358 NLRB No. 43, *27-28 (May 17, 2012) (citing *Sunol Valley*); *The Earthgrains Co.*, 351 NLRB 733, 739 (2007); *In Re S. Pride Catfish*, 331 NLRB 618, 632 n. 16 (2000); *Millsboro Nursing & Rehab. Ctr., Inc.*, 327 NLRB 879, 881 n.2 (1999) (denying opposing parties' joint request to allow Board employee to testify).

Importantly for this case, no "unusual circumstances" existed that would have permitted or required Board Agent Galliano to testify in contravention of the Board's strong and longstanding policy. The Board has held that it will not find "unusual circumstances" exist where other evidence or testimony from other witnesses can provide the information a party seeks through its subpoena of a Board employee. *See Millsboro Nursing & Rehab. Ctr., Inc.*, at 881 (where both parties presented testimony regarding election interference, hearing officer was able to make credibility determinations without testimony from Board employee). In fact, the Board prefers that parties obtain such information from sources other than Board employee testimony. For example, in *Laidlaw Transit, Inc.*, a Board agent permitted an employee to cast a ballot outside polling hours without seeking the positions of the parties. *Id.* at 315. The hearing officer denied the union's request to allow the Board agent to testify. Instead, the hearing officer relied on witness testimony, including every employer and union representative who was present, to determine whether the Board agent acted improperly. *Id.* The Board upheld the determination, holding that "[u]nusual circumstances are not present where other witnesses are available and the issues can be resolved through credibility resolutions." *Id.* at 316; *see also In Re S. Pride Catfish*, 331 NLRB at 632 (finding Board agent testimony not necessary where witness, whose testimony Respondent sought to contradict with Board agent testimony, had been cross-examined).

Lifeway did precisely what the Board requires in situations like these: obtain evidence from sources other than Board employee testimony. The Company presented its attorney who had the conversation with Board Agent Galliano. Petitioner had the opportunity to cross examine the Company's attorney and to call its own observer who was present for the creation of the list, but elected not to do so. The Hearing Officer admitted into evidence the handwritten list from Board Agent Galliano that she had prepared on Petitioner's behalf because of its "shy" observer. (Er. Ex.

12). The Hearing Officer erred when he refused to accept and failed to weigh this evidence. It "could reasonably be understood to indicate that the Board opposed" Lifeway in the election. *Glacier Packing Co., Inc.*, 210 NLRB 571 (1974). Unlike Petitioner's observer, Mr. Ackerman, the Company's observer, received no assistance from Board Agent Galliano. By assisting Petitioner's observer with challenges, the Board Agent gave voters the impression that the Board was opposed to Lifeway's position in the election. The Board Agents' misconduct cannot now be undone or corrected, and the Board must order a new election as a remedy.

VIII. The Hearing Officer erred when he found that the Region's loss of the challenge envelope and ballot of voter Brianne Sadowski and failure to maintain custody of ballot boxes did not destroy laboratory conditions and was not objectionable conduct.

Prior to the hearing, the parties stipulated that "the Company placed Brianne Sadowski on the *Excelsior* list, [and] that the Union did, in fact, challenge her vote at Niles." (Jt. Ex. 1). Consistent with the parties' stipulation, Mr. Ackerman, the Company's observer, recalled Ms. Sadowski came in to vote, that Petitioner's observer challenged her, that he and the other observer "checked her and she voted." (Tr. 557, 600). Mr. Ackerman testified that neither Ms. Sadowski nor any other voter left the polling area after being told their vote was being challenged. (Tr. 557). Although the Hearing Officer relied on a series of misleading questions and answers to different, irrelevant questions in an attempt to avoid this evidence, Board Agent Galliano's uncontroverted list of challenges confirmed exactly what Mr. Ackerman testified to: Ms. Sadowski voted under challenge as a Graphic Designer, a position not listed within the scope of the unit. (Er. Ex. 12; *see also* Er. Ex. 10). Although the challenged ballot appeared on Ms. Galliano's list, Ms. Sadowski's name was left off the master list of challenged ballots that the Region provided to Petitioner and the Company on Friday, June 20 and Tuesday, June 24 (revised with typos corrected). (Er. Ex. 13; Tr. 97-98, 101-02). Testimony by Petitioner's Recording Secretary and Business Agent was that

she and Secretary/Treasurer John Howard observed that Board Agents "dropped the [ballot] boxes off and left" after transporting them from Niles to Morton Grove. (Tr. 865). Perhaps the ballot was lost or commingled at that point. Regardless, both parties promptly raised the issue of this missing ballot with the Region, and the Region could not locate it. (Er. Ex. 14; Tr. 102-03). Board Agent Schlawbowske even "apologize[d] in advance if this was an error on [her] part." (Er. Ex. 14).

The Company cannot know if other ballots (challenged or not) may be missing as well. The only thing that is clear is that as of the date of this filing, the Region still has not located Ms. Sadowski's challenged ballot. The Board does not require that there be actual evidence of mishandling and has rejected a hearing officer's requirement that actual evidence exist. *Paprikas Fono,* 273 NLRB 1326 (1984). "[I]f this Agency is to maintain the public's confidence in its election processes, it is imperative that the Board act dutifully to set aside elections whenever there is any appearance of irregularity in the handling of ballots," just as there clearly is here. *Id.*

CONCLUSION

The Hearing Officer's Report and Recommendations on Challenged Ballots and Objections to Conduct Affecting the Results of the Election, to the extent noted above, conflict with the evidence and Board precedent. Based on the above exceptions and as set forth in its accompanying Brief in Support of Exceptions, Employer Lifeway Foods, Inc. respectfully requests that the Board reject the Hearing Officer's Report and Recommendations and sustain Lifeway's Objections to Conduct Affecting the Results of the Election.

Respectfully submitted,

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Dated: December 5, 2014

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on December 5, 2014, he caused a copy of the foregoing to be filed with the National Labor Relations Board by using the E-filing system on the Board's website and caused additional copies to be served as follows:

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